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May 11, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Salas, Secretary
Federal Communications Commission
445 12th Street, N.W.
Washington, DC 20554

RE: Notice of Inquiry
CS Docket No. 01-7

Reply Comments of Enron Broadband Services, Inc.

Dear Ms. Salas:

Enclosed please find an original and four copies of Reply Comments of Enron Broadband Services, Inc. in the above-referenced docket. Copies of these Reply Comments have also been forwarded on diskette to Royce Dickens of the Cable Services Bureau, Federal Communications Commission, and to International Transcription Service, 1231 20th Street, N.W., Washington, DC 20036.

If you have any questions, please do not hesitate to contact the undersigned.

Respectfully submitted,



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Its Attorneys

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
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MAY 11 2001

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of

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CS Docket No. 01-7

Nondiscrimination in the Distribution of

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Interactive Television Services Over Cable

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To the Cable Services Bureau

REPLY COMMENTS OF ENRON BROADBAND SERVICES, INC.

ENRON BROADBAND SERVICES, INC.

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Dated: May 11, 2001

SUMMARY

Enron Broadband Services ("EBS") urges the Commission to take steps to redress regulatory asymmetries in the current regulatory frameworks applicable to different multichannel video program distributors ("MVPDs"). In particular, the regulatory framework for cable television creates barriers to market entry for interactive TV ("ITV") offerings, and thereby impedes vigorous competition between cable and other platforms. Preservation of these disparate frameworks will predictably affect how the public will receive interactive television and other entertainment products through broadband networks.

Specifically, the rules governing the provision of programming over cable and those governing the provision of ITV programming over common carrier telephone lines are vastly unequal, a condition that now hampers the ability of independent programmers to gain access to the cable networks. These regulatory asymmetries have the cascading effect of forestalling investment in content that could be provided over digital subscriber line ("DSL") or other platforms.

As a market maker, Enron trades numerous commodities including, but not limited to, bandwidth and telecommunications services. In seeking to increase demand for these items, EBS expanded its business to include the development of its own entertainment-on-demand ("EOD") service. EBS has recently conducted successful market tests of this service, which is a combination of video-on-demand, interactive games, educational, documentary, and other premium content products. Our participation in this proceeding is prompted in large part by our difficulties in gaining access to cable platforms, and the lack of availability of adequate alternative distribution platforms.

The Commission has correctly identified a valid market concern. Broadband cable systems can foster the development of ITV. However, as we demonstrate, those cable systems are largely closed to unaffiliated content providers. Other platforms, such need content and are open to unaffiliated ITV providers, but currently have limited ability to foster the development of ITV. Thus, the independent ITV content provider requires access to the cable platform to gain customer acceptance, to develop viable products, and to survive. The development of such viable products in turn is critical to the development of alternative distribution platforms. Without the development of such alternative programs and distribution systems, the public's interest in diverse voices will suffer.

ITV services are numerous and varied. A flexible definition is necessary to ensure that innovation is not foreclosed. EBS recommends that the Commission avoid the identification of "building blocks" that are overly rigid. EBS's own service does not fit neatly within the building blocks identified by the Commission in the NOI. In particular, EBS encourages the Commission to take into consideration that some ITV offerings involve video programming and interactive enhancements on a single "stream"; that caching and storage, including on set top boxes, may be critical to both the entertainment offering and subscriber interactive features; and that certain administrative services such as billing and accounting as well as electronic programming guides may be critical to the success of an ITV offering.

While ITV providers require access to all technology platforms, the Commission is correct that for the foreseeable future, cable will be the optimal distribution medium for ITV. Cable significantly dominates the residential broadband entertainment market and is in effect a local bottleneck for ITV. The significance of cable's role as a "gatekeeper" is made more acute by the fact that subscribers normally choose one MVPD. The Commission is rightly concerned

about the possible consequences to the ITV market if it does not address discriminatory behavior by cable operators.

A nondiscrimination rule limited to circumstances in which cable operators are vertically integrated with ITV providers is, however, too restrictive. The market power and content control enjoyed by cable systems, combined with the inclination to disadvantage competitors and to protect their existing video programming business, creates the incentive and opportunity for cable systems to discriminate against unaffiliated ITV providers. These factors exist regardless of whether a cable operator has its own affiliated ITV operation. Consequently, EBS urges the Commission to broaden its consideration in this proceeding to exclusionary behavior by cable systems with respect to unaffiliated ITV providers, regardless of whether a particular cable system provides its own ITV service.

It is not necessary to identify a particular regulatory classification for ITV, or to adopt broad industry rules to govern ITV. Rather, it is necessary only to address the principal impediment to the development of ITV, namely the ability of cable systems to exercise complete discretion to exclude unaffiliated ITV offerings. The Commission can significantly affect the market opportunities for ITV, and therefore the growth of competition in alternative broadband platforms, by taking a “low impact” approach and adjusting current rules within the existing legal framework to open carriage opportunities for innovative ITV offerings.

Several “low impact” approaches are available to the Commission. The Commission should clarify that under Title VI of the Communications Act of 1934, as amended, (the “Act”) existing commercial leased access rules encompass ITV offerings. This would update the cable regulatory regime to make it more technologically neutral and more relevant to the present digital convergence marketplace. Alternatively, the Commission may determine that cable

systems must be subject to nondiscriminatory treatment for ITV to promote advanced services in accordance with Title I of the Act. Finally, the Commission may find that, in the course of providing transmission services for unaffiliated ITV providers, cable systems are offering a telecommunications service subject to regulation under Title II of the Act. The Commission can substantially mitigate any undue burdens associated with imposing such regulatory obligations on cable systems through the forbearance provisions of Section 10(a) of the Act.

EBS does not believe that a wholesale overhaul of the Commission's regulatory framework is necessary to meet the needs of the developing marketplace. Rather, by clarifying existing regulations and expanding outdated definitions to encompass emerging services and technology, the Commission can ensure that the current regulatory framework keeps pace with consumer demand and innovation. EBS strongly believes that an open, nondiscriminatory marketplace is a win-win situation for service providers, MVPD's and consumers, and is wholly consistent with the values of the 1996 Telecommunications Act, the 1984 Cable Act and the 1992 Cable Act with respect to the promotion of competition.

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
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Nondiscrimination in the Distribution of)
Interactive Television Services Over Cable)

To the Cable Services Bureau

REPLY COMMENTS OF ENRON BROADBAND SERVICES, INC.

Enron Broadband Services, Inc. ("EBS") submits these reply comments in response to the Notice of Inquiry ("NOI")¹ in the above-captioned proceeding.² EBS believes that the Commission has correctly concluded that regulatory asymmetries exist in the current market that may inhibit the development of ITV and its availability across diverse platforms. In particular, the incentives for the dominant platform, cable television, to exclude unaffiliated content most likely will stifle the development of independent ITV offerings, thereby preventing the emergence of competition and diversity in the market for broadband ITV content. This result will in turn deprive rival platforms of a critical driver for the growth of competitive residential broadband services and limit the availability of new services, applications, and content to consumers. EBS suggests "low impact" strategies for ameliorating the adverse effects of

¹ *Notice of Inquiry*, CS Docket No. 01-7, FCC 01-15 (rel. Jan. 18, 2001).

² In submitting these comments, EBS also replies to comments submitted by the following parties in this proceeding: National Association of Broadcasters ("NAB"); Association of Local Television Stations ("ALTV"); Public Broadcasting Service/Assoc. of America's Public Television Stations (collectively, "PBS"); Non-MVPD Owned Programming Networks ("Unaffiliated Networks"); OpenTV; Gemstar-TV Guide; TiVo; Consumers Union/Consumer Federation of America/Center for Media Education ("CME"); Association of Maximum Service Television ("AMST"); Earthlink; DirecTV; EchoStar; SBC Communications, Inc. and BellSouth Corporation; National Cable Television Association ("NCTA"); AT&T; AOL Time Warner; Cablevision; Comcast; Charter; Golf Channel/Outdoor Life/Speedvision/Weather Channel ("Golf Channel"); Scripps Network; Progress and Freedom Foundation ("PFF"); Canal +; National Football League; and Consumer Electronics Retailers Coalition.

regulatory asymmetry within existing regulatory frameworks. In particular, while EBS believes the Commission has the authority under Titles I and/or II of the Communications Act of 1934, as amended, (the "Act") to require that cable operators afford nondiscriminatory access to unaffiliated ITV providers, EBS urges the Commission to clarify that existing commercial leased access rules require access for certain ITV services over cable.

Additionally, to the extent that future developments in technology, services and applications create the need to modify existing regulations because particular ITV services do not fit established service definitions, EBS agrees with numerous parties in this proceeding that the Commission should establish and enforce basic non-discrimination treatment to ensure that consumers have the ability to access the broadest range of ITV broadband content and services over any distribution network they choose.

INTRODUCTION

EBS is a wholly owned subsidiary of Enron Corp. ("Enron"), and is a member of the family of innovative Enron enterprises intent on fostering open markets for high-quality, high-bandwidth facilities and applications. Enron is a world leader in the trading and delivery of commodities, as well as in the management of financial and other risk factors. Enron established an online electronic transaction platform in November 1999 with the launch of EnronOnline, which is one of the largest and most successful e-businesses in the world. Acting as a party at risk and using standard contract formats, Enron successfully trades approximately 1,120 commodities in the energy, industrial, natural resources, financial and communications sectors, including bandwidth.

Broadband interactive video and entertainment services will be significant drivers of bandwidth growth.³ Consequently, EBS entered into a variety of strategic arrangements and ventures to develop content-based services.⁴ Among these applications is its entertainment-on-demand ("EOD") service, a combination of video-on-demand ("VOD"), interactive games, educational, documentary, and other premium content products which has been tested in pilot projects in selected communities across the country.⁵ These pilot projects have successfully demonstrated consumer demand for these new and innovative services and have delivered options and functionality not previously available to those consumers.

In developing its services, EBS has been technologically "agnostic" and in fact anxious to distribute its product over all types of broadband technologies including cable, DSL, and satellite. However, in its efforts to prepare its EOD service for market, EBS has made two critical discoveries. First, as explained in greater detail below, it is apparent that at the present time the quality, capacity and penetration of cable make it the optimal broadband distribution platform.⁶ Second, cable systems have little incentive to deal with competitive broadband

³ Although still nascent, the ITV services market is expected to grow rapidly. *See* Comments of ALTV at 5, (stating that revenues are expected to increase ten-fold from \$665 million in 1999 to \$7.3 billion in 2003, perhaps reaching \$32.1 billion in 2006. EchoStar that consumers are increasingly demanding interactive services "as an indispensable part of any MVPD offering." *See* Echostar comments at 7.

⁴ One of EBS's most widely publicized deals was a video-on-demand venture with Blockbuster, Inc. Enron voluntarily terminated that arrangement in order to secure greater quality and quantity of programming. Enron is actively pursuing other deals with content providers, including for games and music as well as for video. *See, e.g.,* C. Bryson Hull, "Analysts Still Bullish on Enron Broadband," Reuters on Yahoo! Mar. 15, 2001.

⁵ The pilot projects, conducted with Blockbuster, were tested in Seattle, Washington, Portland, Oregon, American Fork, Utah and New York City.

⁶ For example, DBS systems are constrained in delivering EOD services. While the cable system's segmented architecture allows operators to deliver a broad range of EOD services using bandwidth equivalent to one or two analog channels, satellite systems, like DBS, simultaneously serving more than 4 million people have insufficient capacity to deliver EOD services. *See* Josh Bernoff, *Cable's On-Demand Salvation*, The Forrester Report, Apr. 2001, at n.2.

programmers. Unaffiliated broadband content services, especially video-on-demand, compete not only with cable broadband but also with the “plain old cable” video programming services.⁷

Concern over the lack of availability of alternative broadband distribution platforms for its EOD service provides the immediate impetus for EBS’s participation in this proceeding. However, EBS also is concerned about the structure of the evolving broadband market as a whole, and the effect of regulatory asymmetries upon its development. If unaffiliated broadband content providers cannot successfully negotiate access to the cable broadband distribution platform, the market for independently produced broadband content will be severely limited and distorted. With few, if any, incentives for the creation of unaffiliated broadband content for broadband distribution, the content available to alternative broadband distribution platforms (such as DSL or satellite), will all but disappear, thereby further distorting the broadband marketplace as a whole.

Against this backdrop, EBS supports the principles underlying the Commission’s initiative in issuing this NOI. Specifically, the most important guiding principle for communications in the future is open markets. We agree with many commenters in this proceeding that competition and market forces should be relied upon as much as possible, and regulation should be minimal.⁸ In particular, regulation should not dictate technical standards or service characteristics. Regulatory intervention is appropriate, however, when the public interest is harmed by network owners whose market power gives them the ability to stifle innovation,

⁷ See Thomas W. Hazlett and George Bittlingmayer, “The Political Economy of Cable ‘Open Access,’” delivered to the American Economics Association, Jan. 6, 2001, at 11 (hereinafter “Hazlett”), noting that traditional video subscription service is projected to continue generating over two-thirds of industry revenues. In particular, plain old cable (“POC”) revenues are projected to dominate high speed access by over 12 to 1 in 2010.

⁸ See generally, Comments of Comcast at 7-13; Comments of DirecTV at 2-3; Comments of OpenTV at 12-16; Comments of PFF at 2, 4-8; and Comments of Unaffiliated Networks at 7-10.

reduce choice, or impede competition. In such cases, regulation should focus on ensuring fair market rules in the delivery of broadband content as well as in the availability of the content itself. Additionally, in the current dynamic environment, regulation must facilitate progress toward a vision of the future, rather than further entrench legacy rules and market structures.⁹

EBS does not interpret the NOI as necessarily requiring a new regulatory regime for ITV itself. Rather, we believe that many ITV services can gain access to high speed platforms under existing regulations (Titles VI, I and II of the Act) as explained in section IV of these comments. Commission clarification need not be viewed as requiring the imposition of new regulatory burdens on existing services or a departure from the Commission's preference for regulatory restraint for new services. To the contrary, when approached in the proper way, policy adjustments can actually remove regulatory barriers to entry.

Additionally, this proceeding is forward-looking in raising critical issues that must be resolved for the public to gain the full benefit of open markets for emerging ITV broadband services. The problems identified are real and the Commission's attention to them is timely. EBS commends the Commission for the initiation of this proceeding to examine current and emerging problems in the evolving broadband ITV market. EBS urges the Commission not to lose the momentum gained through the initiation of this proceeding. Toward that end, we recommend several specific actions for the Commission, both immediately and in the longer term to ensure that broadband ITV services develop in an environment of fully competitive, open markets. The key is for the Commission, in the near term, to create certainty in this marketplace in order to promote the growth of new, innovative broadband ITV services.

⁹ Commissioner Michael Powell, "The Great Digital Broadband Migration," Remarks before the Progress and Freedom Foundation, Washington, D.C. (Dec. 8, 2000).

ANALYSIS

I. THE NOI IDENTIFIES A VALID MARKET CONCERN

The Commission has correctly observed that a new group of interactive, video-based entertainment services, which it has labeled "ITV", may be disadvantaged in the marketplace if carriage on existing distribution platforms is not somehow assured. Various ITV concepts and configurations have been tried for many years using combinations of traditional technologies. What is new in the current marketplace, and what gives particular importance to the Commission's focus on ITV in this proceeding, is that current ITV concepts are born of true technology convergence. Today's ITV innovations include combinations of service elements that defy traditional categories. The digital streams that will carry ITV may be used for nearly infinitely varied combinations of video, text, audio and data. American consumers have an intense interest in the proliferation and development of these ITV products and services, and the ability to try as many of them as possible from their own homes.

The NOI focuses specifically on the concern that consumer choice may be limited if vertically integrated platforms discriminate against non-affiliated ITV providers. Theoretically, the best antidote to such a potential market failure would be the availability of multiple distribution platforms. The more choices ITV providers have, the less likely it will be that discrimination by any one platform could have a significant deleterious effect on the development of the service. However, as some commenters point out, most consumers choose only one multichannel video programming distributor ("MVPD") to serve their home.¹⁰ Thus, to

¹⁰ See generally, TiVo Comments at 4 (since most consumers subscribe to only one video provider, video providers necessarily occupy a gatekeeper position with respect to their customers regardless of whether they are affiliated with any ITV service provider); see also ALTV Comments at iii, 12 (notwithstanding the current advantage of the cable platform for the delivery of ITV services, once a
(continued...)

provide a true antidote to the discrimination problem, each MVPD platform must be able to offer comparable carriage opportunities. If such carriage opportunities are not available, then consumers will be denied the ability to use many interactive services.¹¹

This is impossible in the current regulatory environment. Broadcasters, direct-to-home satellite operators, common carriers, and cable operators are subject to vastly different regulatory regimes. By virtue of these divergent regulatory regimes, they have markedly different carriage obligations with respect to unaffiliated providers of services in traditional categories: video, voice and data. Therefore, the consumer's choice of an MVPD carries with it not only the particular technical, price and entertainment features that the MVPD offers, but also a unique set of opportunities for (or barriers to) access to new services. Thus, the regulatory framework applicable to a particular MVPD has a significant impact on the source, variety and type of information and entertainment that a consumer of the MVPD may enjoy. Where existing communications systems and regulations no longer suit the dynamic digital broadband world, regulatory approaches must be changed. In the age of convergence, regulation-based differences in carriage obligations become increasingly artificial and non-sensical. The government has an important role in reducing the asymmetries caused by the clash of the "legacy world to our back" with the digital broadband future.¹² As services continue to converge over digital streams, traditional notions of service categories may have to give way and the carriage obligations of MVPDs will have to be adapted to the new marketplace.

consumer chooses a broadband service, that service effectively becomes the gatekeeper platform into the home).

¹¹ See TiVo Comments at 4.

¹² See, e.g., Opening Statement of Michael K. Powell, Chairman, Federal Communications Commission, before the Subcommittee on Telecommunications and the Internet of the House Committee on Energy and Commerce, Mar. 29, 2001, at 2.

This effect is made all the more acute by the existing regulatory frameworks within which different distribution platforms are subject to different regulatory and carriage requirements. Cable operators and direct to home (“DTH”) satellite operators may control content although they have certain limited carriage obligations. Any DTH operator choosing to operate on a broadcast basis would be able to choose content, but would have to meet public interest obligations also imposed on terrestrial broadcasters. DSL operators, as common carriers, do not select content and consequently are more dependent on independent sources for ITV and other entertainment content. The asymmetries among platforms with respect to the incentives and capabilities to foster the growth of independent ITV are depicted in Table 1 below.

Table 1: Regulatory and Market Asymmetry for Independent ITV

Cable	DTH/DBS	DSL
Existing platform would foster growth of independent VOD and ITV services (e.g., bandwidth, residential subscriber base)	Existing platform may foster growth of independent VOD services but not necessarily ITV services (e.g., lack of broadband return path)	Existing platform may not foster growth of independent VOD or ITV services (e.g., lack of bandwidth, geographic restrictions)
Has incentives to reject independent VOD and ITV (to disadvantage competitors; deflect regulation)	Has incentives to reject independent VOD but may have incentives to carry independent ITV (to drive development and deployment)	Has incentives to carry independent ITV (to drive development and deployment of residential broadband platform)
Lack of independent ITV will enhance cable monopoly	Lack of independent ITV is not central to DTH business plan	Lack of independent ITV will hobble DSL

Because these differences in incentives derive from the regulatory structure, any solution must modify the regulatory structure. Without such a modification, the current market and regulatory asymmetry may so hamper the development of an independent ITV, and non-cable platforms will lose the incentive and ability to compete with cable in the residential broadband interactive entertainment market. As a result, the public interest would suffer both from the lack of facilities competition and from the reduced diversity of programming voices.

With the promise of new and advanced services comes the very real concern that the access to the broadband pipe necessary to deliver such services will be controlled by a few monopolies that will limit choice, stifle growth, and set high prices for consumers who really desire such services.¹³ This behavior is expressly contrary to the Commission's existing policies of competition and consumer protection. To combat this behavior, the Commission should take a critical look at the way cable MVPDs use their monopolistic powers to the detriment of competition in the emerging broadband services market, and ultimately, to the detriment of consumers. Cable operators have many possible incentives to block the availability of ITV and other broadband services: to extract concessions from programmers; to prevent access to competing services; to favor an affiliated company; or to resist common carrier regulation. Regardless of incentive, the result is the same: new services are limited or denied, and ultimately, the consumer loses.¹⁴ The legal and regulatory changes necessary to create true technological-neutrality for convergence services, are profound and will take time to develop and implement. EBS understands that this proceeding can only make a limited contribution to the ultimate resolution of these issues. Nonetheless, the Commission is taking crucial and appropriate steps in this NOI toward adjustment of legacy frameworks to allow the potential of future services to be realized.

¹³ As the Comments of CME correctly point out, cable's exclusive programming arrangements are already having a "chilling effect on innovation." Rather than making decisions based on how to best develop and deploy new services in a competitive market, potential programmers and providers of ITV technology and services, like EBS, are making decisions based on "how to pander to the interests of cable operators." Comments of CME at 8.

¹⁴ EBS agrees with the Comments of TiVo that there are several reasons why a MVPD may choose to block access to ITV services, all of which result in a loss to consumers of advanced services. See Comments of TiVo at 3.

In summary, the NOI takes essential first steps in recognizing several interrelated problems in the new video marketplace. First, digitalization and convergence will forever change the nature of “video” services. Increasingly, video services will become hybrid offerings with interactive and non-video components. Second, the current regulatory frameworks and carriage obligations applicable to different types of MVPDs do not establish consistent carriage opportunities for the new hybrid video services. This, combined with the fact that consumers usually choose one MVPD, likely will result in inequities with respect to the ability of ITV providers to gain access to the market, and, ultimately, in consumer access to new ITV services. In addition, the ability of market forces to keep discriminatory behavior in check will be thwarted. Third, without some adjustments to MVPD carriage obligations to accommodate new hybrid video services, MVPDs that have market power and incentives to discriminate can and will remain closed to unaffiliated ITV providers. Removal of the incentive and ability of such MVPDs, particularly cable operators, to exclude unaffiliated ITV providers will be critical to the ultimate success of the market.

II. THE SCOPE OF THE PROCEEDING SHOULD BE BROADENED

A. ITV Service Should Be Defined As Flexibly As Possible

The NOI defines ITV as “a service that supports subscriber-initiated choices or actions that are related to one or more video programming streams.”¹⁵ The NOI acknowledges that it is difficult to arrive at a definition because the ITV market is very new and is rapidly evolving due to continuous technological changes.¹⁶ Nonetheless, the NOI suggests that ITV may be defined

¹⁵ NOI at para. 6.

¹⁶ NOI at para. 6.

primarily by reference to a video signal with related, but separately provided, enhancements.¹⁷ EBS agrees with commenters that this formulation may be too narrow.¹⁸

The record reflects that ITV services are numerous and varied,¹⁹ with many business plans at a nascent stage.²⁰ EBS agrees with commenters such as Comcast that it may not be possible or useful to define ITV as a single type of service. Rather, ITV may better be conceived of as a group of emerging services that share certain characteristics, in particular subscriber interactivity with entertainment programming.²¹ However, the extent to which the service should be defined with respect to particular features or characteristics is unclear.

For example, some ITV services are predominately focused on video programming, including video-on-demand ("VOD"), enhanced TV ("eTV"), "walled garden" services, digital recording²² and personal video recorders ("PVR").²³ Video-rich ITV applications also may

¹⁷ NOI at para. 7. The NOI further suggests that some ITV services, such as email or instant messaging, may not be related to a particular video signal.

¹⁸ For example, under the proposed definition in the NOI, TiVo would not be a provider of ITV services because the data necessary to enable customers to record programming for later viewing is distributed separately and apart from the video streams to which they relate. But TiVo argues that in certain circumstances they are offering ITV services. See TiVo Comments at 3.

¹⁹ The Commission also has acknowledged that ITV has the potential and in some cases, is currently providing a wide range of services. See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Seventh Annual Report*, FCC 01-1 at para. 15 (January 8, 2001) ("*Seventh Annual Competition Report*.")

²⁰ See Golf Channel Comments at 7-8 (Outdoor Life, Speedvision and Golf Channels claim that the business models of many possible applications for interactive services have not yet been developed). See also Comcast Comments at 5 (Comcast is planning to bring a variety of new interactive entertainment, information, and educational services to consumers, but they indicate that "full realization of these plans is neither imminent nor guaranteed").

²¹ See Comcast Comments at 6 (ITV is not a single service but a variety of different potential services that involve a continually evolving technology, commercial relationships not yet established and consumer desires not yet tested.)

²² Comcast plans to offer video-on-demand, interactive program guides, and digital video recording features.

²³ TiVo operates a PVR platform that allows television viewers to customize their viewing experience using advanced searching and storing mechanisms. See TiVo Comments at 1.

encompass services like “play TV,” which permits a customer to play along with a televised game and “Internet TV” which enables a customer to view Internet content on a television screen. Even those services built around a video stream may not be limited to familiar video program content. EBS itself plans to provide an entertainment-on-demand (“EOD”) service that will include video-on-demand as well as interactive games and other content.

On the other end of the spectrum, ITV services may focus less on video content and more on interactive features that give subscribers greater control over what they watch. For example, AOLTV features services ranging between electronic programming guides (“EPG”), email, instant messaging and chat, access to the Internet and enhanced and interactive content.²⁴ Other ITV providers plan to offer variations of “t-commerce” to facilitate electronic queries and purchases of products advertised during a television program.²⁵

Each ITV service may entail entirely different combinations of video streams and interactive enhancements, relying upon different commercial arrangements among the participants and, in all probability, different responses from consumers.²⁶ At this time it is unclear what types of ITV services will gain acceptance in the marketplace and which specific components will make up the service.²⁷ Any definition of ITV should allow room for future combinations.

Flexibility clearly is necessary to encourage and not foreclose innovation in this field.²⁸ Therefore, EBS urges the Commission to adopt a broad definition that encourages the

²⁴ See AOL TimeWarner Comments at 5.

²⁵ See Comcast Comments at 7.

²⁶ See Comcast Comments at 7.

²⁷ AOLTimeWarner Comments at 2.

²⁸ See AMST Comments at ii.

development of different types of ITV services, including varying combinations of video, interactive and informational content.²⁹ Toward this end, EBS suggests that ITV be defined no more narrowly than as:

A service that supports subscriber-initiated choices or actions related to interactive content that may be viewed on a television.

B. ITV Building Blocks Should Be Identified Broadly

The NOI identifies three “building blocks” for the delivery of ITV services: a video stream, a two-way connection for subscriber interactivity and customer premises equipment.³⁰ All ITV services do not, however, require the same combination of delivery features and functions, and thus not all ITV services must utilize each of the three building blocks, or utilize them in the same way. In particular, some services require their own video stream and some do not. Some may require a two-way connection separate from a video stream while some may not. Some services may operate over a converged digital stream carrying combinations of video, voice and data. Some services may require proprietary set top box features or special adaptations to an MVPD’s customer premises equipment, and some may not. Also, some may require other building blocks such as storage and administrative services. EBS urges the Commission to avoid developing policies that may prejudice technical and service configurations. The configuration of

²⁹ See Comments of PBS at 5 (the definition of ITV should include enhanced TV (eTV), walled garden (virtual channels), video-on-demand (VOD), Interactive Electronic Programming Guides (IPG), personal video recorders (PVR), and utility functions including email, chat, calendar, e-wallet, search, address book, program reminders and tickets); *see also* NAB Comments at 2 (urging the Commission to adopt a broad enough definition so it includes both those services that require a return path and those that do not).

³⁰ NOI at paras. 10-13. The Commission had initially articulated the three components necessary for the delivery of ITV services to consumers in the *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee*, Memorandum Opinion and Order, FCC 01-12, 2001 FCC LEXIS 432, (“AOL/TimeWarner Merger Order”) at paras. 250-258.

EBS's service is continually evolving and serves as an example of how difficult it is to describe ITV consistently in terms of certain building blocks.

EBS's EOD service may be delivered over a single broadband connection to an MVPD, using our own dedicated broadband network, or EBS's service may require a connection over the public Internet for interactivity features. Thus, in the configuration currently contemplated, EBS's service most likely will combine the first and second building blocks identified by the Commission. Consequently, EBS urges the Commission not to develop policies based upon the assumption that different building blocks will be required for video streams as opposed to interactive enhancements. Any notion of ITV must accommodate the possibility that all programming and enhancements will be carried on a single "stream." In fact, the NOI notes, "in the more distant future, the distinction between the MPEG video pipeline and the IP connection may disappear."³¹

Second, caching and storage are integral to both the entertainment programming and the subscriber interactive features of EBS's service. These elements are only alluded to in the NOI.³² In some configurations, effective deployment of storage and caching facilities may require interconnection and/or collocation arrangements so that an ITV provider like EBS can utilize its own servers and storage facilities in connection with the MVPD's subscriber delivery system.

Third, EBS's service does not necessarily require separate and proprietary customer premises equipment. EBS's EOD service instead may require allocation of space on the

³¹ NOI at para. 12, n.11.

³² NOI at para. 12.

consumer's set top box for data storage. EBS is very concerned about the availability of data storage as an ITV building block.

Finally, the NOI does not significantly address the various administrative services that an ITV provider may require or seek to obtain from an MVPD to facilitate deployment of its service. For example, in cases where the MVPD maintains the subscriber contact, the ITV provider may require billing and accounting services, access to subscriber proprietary information, access to open software standards or development of applications, and/or various other databases that relate to the service, and inclusion in print as well as electronic programming guides. Different ITV providers will need different combinations of such administrative services, and they are most likely to be the subject of commercial negotiations between the ITV provider and the MVPD. Nonetheless, any nondiscriminatory policy ITV should include consideration of these issues.

Innovation in ITV service configurations should be encouraged and facilitated; regulation should create certainty for innovators of new services and applications while not limiting or restricting the forms these configurations can take. The danger in an overly restrictive definition at such an early stage in service development is the creation, by regulation, of artificial market incentives. Basing MVPD carriage obligations for ITV on particular technical characteristics will skew the ITV market toward configurations that match the rule rather than those that may best serve the consuming public. Therefore, to the greatest extent possible, the "building blocks" for the distribution of ITV should be defined broadly and flexibly to accommodate a wide variety of innovative approaches.

III. THE SUCCESSFUL DEPLOYMENT OF BROADBAND ITV REQUIRES REASONABLE ACCESS TO THE CABLE PLATFORM

A. The NOI Correctly Concludes that Cable Is the Best Delivery Medium For Broadband Interactive Entertainment Services in the Near Term

In order to encourage a vibrant market for broadband services, ITV providers require access to all technology platforms, including cable, DSL, satellite and wireless technologies. Ultimately, the availability of comparable distribution alternatives over a wide array of distribution technologies and systems will be the only means of assuring competition in the ITV marketplace. This competition will, in turn, create incentives for service providers to deploy new services at reasonable prices to the benefit of consumers. Currently, however, the Commission is correct that the optimal distribution medium for ITV service will be cable. This is due to the imbalance of MVPD carriage obligations and ITV access opportunities, as well as significant imbalance in technological capabilities.

The NOI concludes that, at least in the near term, the cable television platform is “likely to be best suited for delivering ITV services, particularly high speed services.”³³ Consequently, although the NOI seeks information on a broad range of configurations of ITV, including services that may be distributed over analog media or by such other technologies as DSL and satellite, it is focused on the creation of a general nondiscrimination rule that may be made applicable to cable television operators. EBS agrees that the only way to assure provision of such services to the highest number of consumers in the near term is to ensure access to the most efficient infrastructure for the provision of services. Currently, that platform is cable.³⁴

³³ NOI at para. 21; *see also* Comments of EchoStar at 4.

³⁴ *See generally*, Comments of Unaffiliated Programmers at 13-15.

To date, EBS has conducted its pilot programs with DSL providers. DSL operators typically do not have their own programming content, and have significant market incentives to provide ITV distribution services. The cable platform currently has significant advantages over other platforms from both a technology and service perspective, particularly for broadband ITV. These advantages include an enormous national footprint, economies of scale, established customer relationships, and several technical advantages including high upstream and downstream bandwidth capacity and speed, which allows cable to “simultaneously deliver a variety of interactive services and a return path through one digital pipeline.”³⁵ Consequently, it is appropriate for the Commission to focus on the cable distribution platform for ITV.³⁶

B. Cable Is A Local Bottleneck For ITV

The position of cable in the video and entertainment delivery market mandates that the Commission carefully examine the possible incentives for, and effects of, discrimination and exclusion on the part of cable operators with respect to ITV. The potential for such behavior stems from the fact that cable is a bottleneck for ITV distribution. To the extent that cable operators have neither the incentive nor obligation to carry independent ITV programming, their subscribers will be effectively denied access to these new services. In addition, VOD directly competes with cable’s premium video programming and special pay-per-view services.³⁷

³⁵ Comments of AT&T at 23.

³⁶ See, e.g., Josh Bernoff, *Cable’s On-Demand Salvation*, The Forrester Report, Apr. 2001, at 2 (digital cable can deliver a broad range of interactive applications, a key application that satellite cannot deliver); *Prime Numbers*, CABLE WORLD, Apr. 30, 2001 at 24-25 (citing information from 2001 Paul Kagan Associates Reports which show that the cable platform has significant service advantages over other platforms for high speed services).

³⁷ See Hazlett at 11, noting that a broadband cable provider “might be expected to restrict customers’ access to streaming video from competitive content sources, in order to preserve its market of traditional cable video.”

Despite cable industry claims that there are competitors in the MVPD marketplace,³⁸ the Commission's recent *Seventh Annual Competition Report* on the video programming market,³⁹ shows that cable serves an overwhelmingly dominant percentage of MVPD subscribers (80%). There is little reason to expect cable's dominant position to recede in the future. Cable is the MVPD of choice for by far the largest segment of the consuming public. Cable is even more dominant with respect to broadband ITV. The general dominance in the entertainment delivery market gives cable an unparalleled amount of power in the developing ITV market. Moreover, the incumbent cable systems tend to be a monopoly in a particular local market. Although cable "overbuilds" are permitted in many locations, very few overbuilds actually have been constructed.⁴⁰

The significance of this market power is made even more acute by the fact that, as TiVo points out, very few households subscribe to more than one MVPD.⁴¹ The MVPD selected by a subscriber effectively acts as a "gatekeeper" with respect to the content that subscriber may access. Under any circumstances, the Commission should be concerned that any MVPD may abuse this gatekeeper role. However, the cable legal framework, pursuant to which cable operators have relatively unfettered control over the content carried on their systems, exacerbates the problem. Unlike DBS and DSL, which are both subject to certain carriage requirements as a

³⁸ See, e.g., Comments of NCTA at 20-24.

³⁹ See generally, *Seventh Annual Competition Report*.

⁴⁰ See Hazlett, Table 1 (showing that overbuilders represent less than 1% of subscribers in the total U.S. residential broadband market).

⁴¹ See Comments of TiVo at 4.

result of the applicable legal framework, the cable legal framework effectively insulates the operator from carriage obligations, except in very limited circumstances.⁴²

AT&T asserts that barriers to entry are low for ITV providers and competition is burgeoning among platforms for the distribution of ITV services.⁴³ In support of its thesis, AT&T points to the ease with which “any content developer with a good idea and some basic software tools that can be obtained for little or no cost can develop very sophisticated and compelling ITV applications.”⁴⁴ Ideas may be cheap, but distribution may come dear. AT&T also points to the many ITV innovations initiated by cable systems. However, this begs the question of how well cable systems respond to requests for carriage by competing ITV providers. Finally, AT&T asserts that other competitive ITV distribution platforms are emerging, including DSL providers, broadcasters, computer-based platforms and hybrid systems. However, AT&T’s quantitative analysis glosses over the qualitative differences between all of the variations of ITV services and distribution platforms that are emerging. AT&T fails to acknowledge that in the realm of broadband ITV cable distribution is necessary for success.

Thus, the Commission is rightfully concerned about the possible consequences to the ITV market if it does not consider limits on the ability of cable operators to discriminate.⁴⁵ NCTA admits in its comments that “most cable operators have not even determined how, if at all, they will use or offer ITV.”⁴⁶ A decision by cable operators whether or not to offer ITV will have an

⁴² In *Time Warner Entertainment Co. v. United States of America*, 211 F.3d 1313 (Ct. of App., D.C. 2000), the Court distinguished between a cable operator and a newspaper publisher to illustrate Congress’s reason for enacting the channel occupancy provision, stating that “a newspaper publisher does not have the ability to exclude competing publication from its subscribers’ homes.”

⁴³ See Comments of AT&T at 8-23

⁴⁴ *Id.*

⁴⁵ See NOI at para. 20.

⁴⁶ NCTA Comments at 39.

enormous impact in the ITV industry. Certainly taking action now to cure a clear problem within the current regulatory framework is preferable to waiting until market failure becomes acute and then trying to “roll back the clock.”⁴⁷

Thus, EBS urges the Commission to identify discriminatory and or exclusionary behavior by cable systems with respect to the carriage of independent ITV programming as the central issue in this proceeding.

C. A Cable Nondiscrimination Rule With An Affiliate Trigger is Too Restrictive

The NOI focuses on a nondiscrimination rule that would be triggered by the choice of a cable operator to offer its own ITV services directly or through an affiliate.⁴⁸ The NOI concludes that the cable legal and regulatory framework, particularly the Cable Act of 1992, suggests that if regulations are to be applied to ensure ITV delivery to consumers, they should be applied only in the case of vertically integrated cable ITV providers. The NOI also assumes that the predicate for regulation in this proceeding is “market power possessed by the owner of a distribution platform vertically integrated into ITV services.”⁴⁹ As explained more fully below, EBS believes that this formulation is too narrow.

EBS agrees that market power wielded by cable operators is a significant problem for ITV distribution. We disagree, however, that the problem is limited to those cases in which the cable platform is vertically integrated into ITV services. Cable market power creates incentives to exclude ITV providers regardless of whether the cable company is vertically integrated with ITV services. Specifically, as mentioned above, economists Thomas Hazlett and George

⁴⁷ See Comments of AMST at 5, noting that the Commission recognized in the AOL/Time Warner merger that “a small amount of nonintrusive regulations now is infinitely preferable to attempting to roll back the clock later, especially with respect to newly-emerging technologies.”

⁴⁸ See NOI at paras. 21 and 33.

Bittlingmayer demonstrate that cable operators successfully maintain an “applications barrier to entry” by restricting access to their platforms by competitive video services, and by impeding the growth of services that could help the growth of rival networks.⁵⁰ To the extent that cable operators open their platforms to unaffiliated broadband video services, they risk “empowering competitors to challenge cable’s lucrative video market head to head....”⁵¹ Cable systems may have the incentive to exclude any form of competitive entertainment programming from an independent source simply because it competes with the cable operator’s own programming line up. For example, a cable system not offering any form of ITV itself may nonetheless have the incentive to exclude a VOD offering from an independent source simply because it would compete with the cable system’s own video programming. This incentive to exclude may exist solely because the ITV offering competes with the cable system’s regular entertainment content, regardless of any interactive features. However, EBS believes that cable systems also have an incentive to exclude interactive entertainment programs, unless and until the cable system can develop its own ITV offerings, in order to forestall the development of entertainment markets that cable cannot control.

Hazlett and Bittlingmayer also hypothesize that cable operators have the incentive to artificially restrict bandwidth available to competing services to forestall “appropriation by regulation,”⁵² and avoid being treated as common carriers. All cable systems have the incentive to deflect common carrier regulation and will have the incentive to resist giving access to independent programming sources if it would compromise their ability to argue, as the cable

⁴⁹ NOI at para. 38.

⁵⁰ See Hazlett at 19-21.

⁵¹ *Id.*

⁵² *Id.* at 16.

parties have in this proceeding, that as cable operators they enjoy special protection from common carrier regulation.⁵³

According to Hazlett and Bittlingmayer, the twin goals of deterring common carrier regulation and limiting the advantages to potential rivals of the stimulation of a market for ITV, particularly over the Internet, have led cable operators to engage in “defensive engineering” through under allocation of bandwidth and the maintenance of a “slow access” infrastructure.⁵⁴

It is clear that, under either theory, incentives for cable operators to exclude competitive content exists independently of any vertical integration. Although cable operators certainly have a financial incentive to favor affiliated program providers over non-affiliated providers, historical concerns about vertical integration do not fully encompass the current problem of access and distribution for ITV and other broadband services. Therefore, any policy of non-discrimination should apply to all cable operators, not just those that have affiliations with programming and ITV service providers.

The AOL/Time Warner merger illustrates how modern day cable operators are capitalizing on their bottleneck access to the home to control and cash in on a carefully managed “walled garden” of proprietary content. EBS agrees with consumer groups such as CME that worry about limitations to consumer choice in these “walled garden,” “walled jungle” or “fenced prairie” environments.⁵⁵ EBS also agrees with NAB that cable operators “have ‘systemic reasons’ for discriminating against competitors, regardless of the existence of any vertical relationships,” and that digital cable systems, in particular, will have the ability to control all of

⁵³ See, e.g., NCTA Comments at 49-53.

⁵⁴ *Id.* at 19.

⁵⁵ CME Comments at 5-6.

the elements of any interactive service to the disadvantage of competitors.⁵⁶ EBS agrees with the comments of NAB that even non-vertically integrated cable operators will be able to exercise market power in the ITV market.⁵⁷ EBS believes that cable operators have amply demonstrated that they are willing to wield their monopolistic power to retain programming control, even in the absence vertical integration with respect to a particular type of programming, often to the detriment of their own subscribers.⁵⁸

Thus, EBS urges the Commission to broaden its consideration in this proceeding to the incentives and opportunities for exclusionary behavior by cable systems with respect to ITV, regardless of whether the cable system provides its own ITV service. Further, an industry-wide approach is necessary. For example, while the obligations placed on AOL/Time Warner are certainly in the best interests of the consumer, millions of video subscribers do not receive their programming from AOL/Time Warner, and are therefore not protected by the Commission's party-specific obligations imposed in the context of that merger. Only with an industry-wide solution to certain critical exclusionary behaviors will the Commission be assured that consumers, not monopoly cable operators, will shape the emerging ITV service marketplace.

⁵⁶ NAB Comments at 17.

⁵⁷ See Comments of NAB at 17.

⁵⁸ Time Warner's abrupt cancellation of ABC programming in several cities during its dispute last year with Disney illustrates that the cable operator's financial bottom line is significantly more important than its concern for customer satisfaction. See Comments of ALTV at 8-9 (citing examples of anti-competitive behavior exhibited generally by Time Warner).

IV. THE COMMISSION HAS AMPLE AUTHORITY TO PROMOTE THE DISTRIBUTION OF BROADBAND ITV SERVICES BY CABLE UNDER EXISTING REGULATORY FRAMEWORKS

A. The Commission Has Sufficient Authority and Jurisdiction to Address Cable Carriage and Access Issues for ITV Where Needed

The Commission has sufficient authority and jurisdiction within the existing legal framework to address the cable carriage and access issues for ITV most in need of attention. EBS urges the Commission not to attempt to fashion a comprehensive regulatory approach to ITV, but instead to pursue a focused approach to remedy only those deficiencies in the current regulatory framework that contribute to barriers to entry for ITV. The record indicates that not all forms of ITV experience barriers to entry.⁵⁹ However, it is clear that barriers do inhibit the development of broadband ITV applications that must rely for the foreseeable future on distribution by digital cable systems that may have no incentive to carry unaffiliated programming. By following a focused "low impact" approach, the Commission can make measured adjustments to certain current rules, adapting them to the new convergence marketplace without running the risk of over regulating a nascent service.

The lack of incentives for cable operators to carry unaffiliated ITV programming must be addressed. Nondiscriminatory carriage obligations firmly grounded in existing policies favoring diversity of voices⁶⁰ will create significant consumer benefits with minimal adverse regulatory impact.

⁵⁹ Comments of AT&T at 8-23; Comments of Canal+ at 11-13.

⁶⁰ This policy favoring diversity of programming voices is evident in the extension and enforcement of existing carriage requirements found in the commercial leased access rules, 47 U.S.C. § 532, 47 C.F.R. §§ 76.970-76.977; the program access rules, 47 U.S.C. § 548, 47 C.F.R. §§ 76.1000-76.1003; and open video systems rules, 47 U.S.C. § 573, 47 C.F.R. §§ 76.1503(a), 76.1504, 76.1507 and 76.1512.

Contrary to the arguments of AT&T⁶¹ and NCTA, the adoption, or more properly, the enforcement of, an access policy applied to all MVPDs, including cable operators, will not deter investment and innovation. Rather, the regulatory policy of non-discrimination will assure ITV and other broadband service providers that new and advanced services will have a platform to the customer, allowing the customer to rightly determine which services succeed.⁶² This is the promise of a rich, competitive market that can only be achieved by nondiscriminatory access to broadband platforms, and such a market will lead to further investment in and deployment of advanced services.⁶³

This is not a zero-sum game, as the cable operators would have us believe. Instead, an open marketplace is a win-win situation for service providers, MVPDs and most of all, consumers. Cable operators would, of course, be fairly compensated for the use of their system. By ensuring that a viable market exists for advanced broadband services, the Commission will promote the essential values of the Telecommunications Act of 1996 as well as the 1984 and 1992 Cable Acts, and maintain a consistent position with respect to promotion of competition in the multi-channel video marketplace.⁶⁴ As described below, EBS believes that the Commission can implement appropriate solutions under each of Titles VI, I and II.

⁶¹ See Comments of AT&T at 31-32.

⁶² Not only will ITV service and content providers have greater incentives to invest in and develop new and innovative ITV services, a uniform national policy, as opposed to a patchwork of inconsistent state and local policies, would end uncertainties and disparities currently associated with the offering of ITV services. See Comments of NAB at 7-8.

⁶³ Cablevision's claim that Commission regulation might jeopardize the speed and success of Cablevision's proprietary roll-out of ITV services does not justify non-action by the Commission. See Comments of Cablevision at 5.

⁶⁴ Comments of NAB at 11.

B. Cable Systems Should Be Subject To Nondiscriminatory Carriage Rules for ITV Under Title VI Leased Access Requirements

The 1984 Cable Act's legislative history illustrates the importance that Congress placed on assuring that cable systems provide the public with a true diversity of programming sources that would be "consistent with the First Amendment's goal of robust marketplace of ideas – an environment of 'many tongues speaking many voices.'"⁶⁵ For this reason, Congress found it imperative to enact the commercial leased access provision of the 1984 Cable Act. The requirement that cable systems provide cable channels for commercial use assures that "sufficient channels are available for commercial program service which compete with existing cable offerings, or which are otherwise not offered by the cable operator."⁶⁶ The leased access provisions are the best illustration of Congress's concern with the monopoly power of cable operators.

The commercial leased access requirements, set forth in Section 612 of the Act,⁶⁷ provide the best opportunity to clarify existing cable carriage requirements to ensure access for ITV. The requirements, initially adopted in the 1984 Cable Act and subsequently amended in 1992 and 1996, were designed to assure access to cable systems with 36 or more channels by unaffiliated third parties who have a desire to distribute video programming free of the editorial control of cable operators. The goal of the 1992 Cable Act was not only to "ensure that cable television operators do not have undue market power," but also to "promote the availability to the public of a diversity of views and information."⁶⁸ Thus, the leased access set-aside requirements were

⁶⁵ H.R. Rep. No. 98-934, at 19, *reprinted in* 5 U.S.C.C.A.N., 4656.

⁶⁶ H.R. Rep. No. 98-934, at 30, *reprinted in* 5 U.S.C.C.A.N., 4655, 4667.

⁶⁷ 47 U.S.C. § 532.

⁶⁸ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, Sec. 2(b) ("1992 Cable Act").

modified in 1992 to “assure the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with the growth and development of cable systems.”⁶⁹ The Supreme Court has repeatedly emphasized the Commission’s duty and authority under the Communications Act to promote diversity⁷⁰ and competition among media voices.⁷¹ Accordingly, the Court had no difficulty in concluding that the Commission’s interest in “promoting widespread dissemination of information from a multiplicity of sources” is “an important governmental interest.”⁷²

Section 612 of the Act states that a cable operator must offer leased access capacity for “commercial use,” which is defined as “video programming, whether or not for profit.”⁷³ Video programming is further defined as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.”⁷⁴ The FCC has

⁶⁹ 47 U.S.C. §§ 532(a), 532(b)(1). Cable systems with 36 or more activated channels are required to comply with these set-aside requirements.

⁷⁰ See S. Rep. No. 92, 102d Cong., 1st Sess. 58 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1192; H.R. Rep. No. 628, 102d Cong., 2d Sess. 28, 63 (1992). Certain other provisions of the Communications Act also incorporate the public policy goal of diversity. See, e.g., 47 U.S.C. § 521 (“The purposes of this title are to . . . assure that cable communications . . . are encouraged to provide the widest possible diversity of information sources. . . .”); 47 U.S.C. § 532(a) (“The purpose of this section is to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public. . . .”); 47 U.S.C. § 548(a) (“The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market. . . .”).

⁷¹ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) *quoting United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1982).

⁷² *Turner Broadcasting*, 512 U.S. at 663.

⁷³ 47 U.S.C. § 532(b)(5).

⁷⁴ 47 U.S.C. § 522 (20).

interpreted this statutory definition to apply to the type of television programming in existence when the rule was first adopted in 1984.⁷⁵

The Commission modified some of its leased access rules in 1997 after finding that it “must ensure a ‘genuine outlet’ for leased access programming in order to further the statutory goals of competition in the delivery of video programming sources and diversity of programming sources.”⁷⁶ To that end, the Commission concluded that “so long as a [cable operator’s] available leased access capacity is sufficient to satisfy the current demand for leased access, all leased access requests must be accommodated as expeditiously as possible, unless the operator refuses to transmit the programming because it contains obscenity or indecency.”⁷⁷ Under the Commission’s commercial leased access rules, cable operators are required to offer up to 15 percent of their capacity to unaffiliated providers of video programming pursuant to the leased access rules.⁷⁸ This set aside is in addition to, and separate from, set-aside requirements for must-carry channels and public, educational and government access channels.⁷⁹

⁷⁵ *Telephone Company-Cable Television Cross-Ownership Rules*, 7 FCC Rcd. 5781 at para. 75 (1992) (“*Second Video Dialtone Order*”).

⁷⁶ See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, *Second Report and Order and Second Order on Reconsideration of the First Report and Order*, 12 FCC Rcd. 5267 (1997) at para. 85.

⁷⁷ *Id.* at ¶ 99.

⁷⁸ Cable operators with 36 to 54 activated channels must set aside 10% of their channels, excluding broadcast must-carry channels; operators with 55 to 100 activated channels must set aside 15% of their activated channels, excluding broadcast must-carry channels, and operators with 101 or more activated channels must set aside 15% of all their channels, with no exclusions. See 47 C.F.R. §§ 76.56 *et seq.* and §§ 76.970 *et seq.*

⁷⁹ In determining the percentage of activated channels a cable operator must set aside for CLA, some cable operators may exclude broadcast must-carry channels but all operators must include broadcast stations carried pursuant to retransmission consent agreements. A cable operator may also fill up to one-third of its CLA set-aside channels with qualified educational or minority programming services. For example, if the total number of channels an operator must set aside for CLA is six, the cable operator may choose to fill two of these channels with qualified educational or minority programming. “Qualified educational programming” is defined as programming from a source that devotes substantially all of its
(continued...)

Under the commercial leased access rules, a cable operator may not discriminate among commercial leased access programmers based on content, and may not have any editorial control over commercial programming, with limited exceptions for indecency and obscenity, and may consider content only to the minimum extent necessary to establish a reasonable price for non-affiliated programmers.⁸⁰ Thus, the leased access rules already provide a framework for nondiscriminatory access to cable systems for competitive video content.

Unfortunately, the leased access rules have failed to assure diversity of programming content to cable system subscribers.⁸¹ The scope of the requirement, as interpreted by the Commission, is narrow and negotiations with cable systems have been difficult. Moreover, the entities that have attempted to take advantage of the commercial leased access rules have, for the most part, been smaller video programmers that can ill afford the piecemeal negotiations among different cable system operators to achieve significant carriage.

A meaningful opportunity exists for the Commission to expand the applicability of the commercial leased access rules to make them more relevant in the context of modern day convergence services, particularly ITV, and to reap the benefits of the diversity that the rules were supposed to achieve. The Commission need only clarify that, consistent with the updated cable statutory framework enacted in 1992, the term "video programming" may encompass

programs to educational or instructional programming that promotes public understanding of mathematics, the sciences, the humanities, and the arts and has a documented annual expenditure on programming exceeding \$15,000,000. 47 U.S.C. § 612(i)(3). "Qualified minority programming" means programming from a source which devotes substantially all of its programming to coverage of minority viewpoints, or to programming directed at members of minority groups, and which is over fifty (50) percent minority owned. 47 U.S.C. § 612(i)(2).

⁸⁰ 47 U.S.C. § 532(c)(2).

⁸¹ See Hazlett at 35-36, noting that cable leased access has never attracted third party content for distribution over cable television systems and attempts by the FCC to remedy the situation "have been cut down by a coalition of cable operators and cable programmers concerned that access for individual programs will crowd out channel slots for niche cable networks."

varieties of television programming currently found in the market, including ITV. This modest change within the current legal framework would open a world of opportunity for ITV providers. It would also significantly update the cable legal regime to one more technologically neutral, without changing in any significant way the overall regulatory framework for cable or adding and significant new burdens. Indeed, failure to broaden the interpretation of "video programming" to keep step with modern technology and service innovations ultimately may doom the commercial leased access rules to irrelevancy.

Further, contrary to AT&T's contention,⁸² Section 612(g) provides the Commission with express statutory authority to "promulgate any additional rules necessary to provide diversity of information sources" once the 70/70 benchmarks have been met,⁸³ including clarifying that the existing rules require access for ITV service over cable. As the legislative history accompanying Section 612(g) states:

subsection 612(g) provides a mechanism to assure there is adequate flexibility to develop new rules and procedures with respect to the *use* of leased access channels as the cable industry develops and serves more citizens in the future.⁸⁴ (emphasis added).

In creating subsection 612(g), Congress recognized "that the cable industry, and in particular the programming sector of the industry, is still in a developmental stage."⁸⁵ Rather than restricting the Commission to modifying the existing leased access requirements, as AT&T suggests,⁸⁶ the legislative history shows that Congress was intent on providing the Commission

⁸² Comments of AT&T at 39.

⁸³ 47 U.S.C. § 532(g).

⁸⁴ House Report No. 98-934, at 54, *reprinted in* 5 U.S.C.C.A.N., 4691.

⁸⁵ *Id.*

⁸⁶ Comments of AT&T at 40.

with sufficient authority to create new rules and procedures to ensure that *use* of the leased access channels, as cable programming evolved to include new services, such as broadband interactive video and entertainment services. Thus, to the extent that the 70/70 benchmarks have been met, which already may have occurred, the Commission has express statutory authority to create new rules to accommodate certain ITV services under the commercial leased access rules.

C. Cable Systems May Be Subject To Nondiscriminatory Carriage Rules for ITV Under Title I Ancillary Jurisdiction To Promote Advanced Services

EBS agrees with the Commission's conclusion that given the current state of technology, the modern cable platform provides substantial advantages for delivering high speed ITV services, for at least the near term.⁸⁷ Cable's superior position for distributing high speed ITV services gives it market power, which may necessitate some regulation of the cable distribution facilities to ensure that cable operators do not engage in anticompetitive behavior when dealing with unaffiliated high speed ITV service providers.

Among the fundamental goals of the 1996 Act is the promotion of innovation, investment, and competition among all participants and for all services in the telecommunications marketplace, including advanced services.⁸⁸ Section 706 of the Act⁸⁹ is a Congressional mandate to the Commission to examine the availability of advanced telecommunications capability to all Americans.⁹⁰ Section 706 directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications

⁸⁷ See NOI at paras. 3, 21.

⁸⁸ Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. 1 (1996).

⁸⁹ 47 U.S.C. §157 note.

⁹⁰ "Section 4 of the Bill [later section 706 of the 1996 Act] states clearly that this bill is intended to establish a national policy framework designed to accelerate rapidly the private sector deployment of advanced telecommunications." S. Rep. 104-23 at 27, Mar. 30, 1995.

capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity . . . measures that promote competition in the local telecommunications market, and other regulating methods that remove barriers to infrastructure investment.”⁹¹ The statute defines “advanced telecommunications capability” without regard to any transmission media or technology, as “high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.”⁹² In section 706(b) of the 1996 Act, Congress instructed that, if the Commission finds that deployment is not “reasonable and timely,” to take immediate action to lower barriers to investment and to promote competition.

Given the opportunity for anti-competitive behavior by cable operators, sole reliance on market forces could have a detrimental effect on the future availability of innovative technologies. This clearly would be contrary to the intent of Section 706 of the Act and the Commission’s goals with respect to advanced services. The objectives of the 1996 Act are effectively hindered when broadband ITV services are denied access to the cable platform.

The Supreme Court has long established that the Commission has the authority to promulgate regulations to effectuate the goals and accompanying provisions of the Act in the absence of explicit regulatory authority, if the regulations are reasonably ancillary to existing Commission statutory authority.⁹³ Section 154(i) of the Act provides the Commission with

⁹¹ 47 U.S.C. § 157 note.

⁹² 47 U.S.C. § 157 note.

⁹³ See, e.g., *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (J. Scalia, writing for the majority upholding the Commission’s exercise of ancillary jurisdiction pursuant to Section 201(b)); *United States v. Southwestern Cable*, 392 U.S. 157, 178 (1968) (sustaining the jurisdiction of the Commission to regulate cable television to the extent “reasonably ancillary to the effective performance of the Commission’s various responsibilities. . .[and] may, for these purposes, issue ‘such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,’ as ‘public (continued...)”)

ancillary authority to promulgate additional regulations that might be required in order for the Commission to meet its principal obligations contained in other provisions of the statute.⁹⁴

Section 151 also directs the Commission to “execute and enforce the provisions of [the] Act.”⁹⁵

Thus, in light of finding that the existing regulatory regime effectively hinders one of the principal goals of the 1996 Act, and because Commission action is reasonably ancillary to several explicit statutory provisions, the Commission has the necessary statutory authority to open a proceeding to promulgate rules that require cable platforms to provide Nondiscriminatory access to broadband ITV services.

convenience, interest, or necessity requires.”); *National Broadcasting Comm’n v. United States*, 319 U.S. 190, 219 (1943) (Congress “did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general regulatory problems for the solution of which it was establishing a regulatory agency”); *Texas Rural Legal Aid, Inc. v. Legal Serv. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) (a “congressional prohibition of a particular conduct may actually support the view that the administrative entity can exercise its authority to eliminate a similar danger”); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1183 (D.C. Cir. 1989) (upholding Commission’s authority to reinstate syndicated exclusivity rules for cable television companies as ancillary to the Commission’s authority to regulate television broadcasting); *Rural Tel. Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988) (upholding Commission’s pre-statutory version of the universal service fund as ancillary to its responsibilities under Sections 1 and 4(i) of the Communications Act, stating that “[a]s the Universal Service Fund was proposed in order to further the objective of making communications service available to all Americans at reasonable charges, the proposal was within the Commission’s statutory authority”); *North American Telecomm. Ass’n v. FCC*, 772 F.2d 1281, 1292-93 (7th Cir. 1985) (“Section 4(i) empowers the Commission to deal with the unforeseen – even if [] that means straying a little way beyond the apparent boundaries of the Act – to the extent necessary to regulate effectively those matters already within the boundaries”) (citations omitted); *Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092, 1109 (D.C. Cir. 1981) (“The instant case was an appropriate one for the Commission to exercise the residual authority contained in Section 154(i) to require a tariff filing. . . . The Commission properly perceived the need for close supervision and took the necessary course of action: it required LT&T to file an interstate tariff setting forth the charges and regulations for interconnection.”); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 731 (2d Cir. 1974) (holding that “even absent explicit reference in the statute, the expansive power of the Commission in the electronic communications field includes the jurisdictional authority to regulate carrier activities in an area as intimately related to the communications industry as that of computer services, where such activities may substantially affect the efficient provision of reasonably priced communications service”).

⁹⁴ 47 U.S.C. § 154(i) (“The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions”).

⁹⁵ *Id.*

D. Cable Operators May Be Deemed To Provide Telecommunications Services In Connection With The Carriage Of Unaffiliated ITV Services

EBS agrees with SBC/BellSouth that the issue of the regulatory classification of transmission services provided by cable operators for the carriage of unaffiliated ITV services is different than the regulatory classification of ITV itself.⁹⁶ In the provision of transmission services for the ITV programming of an unaffiliated ITV provider, however, the cable system may very well be engaged in the provision of a telecommunications service. Although the Act provides that a cable operator shall be exempt from common carrier regulation insofar as it provides "cable service,"⁹⁷ nothing in the Act insulates a cable operator from regulation under Title II for the provision of telecommunications services in connection with the carriage of unaffiliated programming.

Because, as described above, cable operators control the dominant transmission facilities for high speed ITV services, they necessarily possess market power over the transmission component that is essential for the development and distribution of unaffiliated ITV services. Consequently, common carrier regulation of that transmission component will be necessary to protect against anticompetitive behavior.⁹⁸

⁹⁶ SBC and BellSouth Comments at 5.

⁹⁷ 47 U.S.C. § 541(c).

⁹⁸ As evidenced by its recent change of the name of its association to the "National Cable and Telecommunications Association," it is clear that the cable industry is thrusting itself into the telecommunications arena. The cable industry should not be able to have it both ways. To the extent that cable operators are engaged in the provision of telecommunications services, special insulation from regulatory requirements applicable to other telecommunications carriers is not justified. See "NCTA Changes its Name to National Cable & Telecommunications Association," Press Release, Apr. 30, 2001, available at <http://www.ncta.com/press>. According to the NCTA, the change "reflects cable's transformation from a one-way video provider to a competitive supplier of advanced, two-way services, including digital video, high-speed Internet, cable telephony and interactive TV."

Such treatment of cable systems in connection with the provision of transmission for unaffiliated ITV services does not require that ITV itself be regulated as a common carrier service. Rather, cable systems should be required to comply with the requirements of Title II that access to the cable platform be made available on terms and conditions that are neither unjust nor unreasonably discriminatory. The Commission may avoid the imposition of common carrier regulatory obligations on cable systems for the carriage of ITV services through resort to the forbearance provisions of Section 10(a) of the Act.⁹⁹

⁹⁹ 47 U.S.C. § 160(a).

CONCLUSION

For the reasons expressed above, EBS respectfully requests that the Commission clarify that existing commercial leased access rules establish nondiscriminatory access for broadband ITV services over digital cable systems as described herein.

Respectfully submitted,

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